ORIGINAL

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD SHERMAN WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

83-6048

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

(MEMBER OF THE BAR
OF THIS COURT)

QUESTION PRESENTED

QUESTION	PAGE
THE TRIAL COURT'S REFUSAL TO GRANT A CONTINUANCE OF THE PENALTY PHASE OF A CAPITAL TRIAL, IN THE FACE OF DEFENSE COUNSEL'S UNCONTROVERTED REPRESENTATION THAT HE WAS TOTALLY UNPREPARED TO PRESENT ANY EVIDENCE IN MITIGATION, AND THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE DEATH SENTENCE UNDER THESE CIRCUMSTANCES, VIOLATED PETITIONER'S RIGHT, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, TO COUNSEL REASONABLY LIKELY TO RENDER EFFECTIVE ASSISTANCE.	5

TABLE OF CONTENTS

TABLE OF CITATIONS

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Williams v. State, 438 So.2d 781 (Fla. 1983), is set forth in Appendix A. The motion for rehearing and denial thereof are set forth in Appendix B and C.

JURISDICTION

Review is sought pursuant to 28 U.S.C. 1257(3). The judgment below was entered on September 8, 1983, and petitioner's timely motion for rehearing was denied on November 4, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), which is set forth in Appendix D. This case involves the Sixth Amendment to the United States Constitution (right to effective assistance of counsel), the Eighth Amendment to the United States Constitution (guarantee against cruel or unusual punishment), and the Fourteenth Amendment to the United States Constitution (making the Sixth and Eighth Amendments applicable to the states; see Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)).

STATEMENT OF THE CASE

Petitioner was indicted for first degree murder in the death of Roy Huff, and on February 20, 1981 the jury returned a verdict finding him guilty as charged. The trial court adjudged petitioner guilty of first degree murder and announced that the penalty phase would begin at 3:00 p.m., after a lunch break of approximately two hours (App.E.1,3). Defense counsel moved for a continuance of the penalty phase to permit petitioner "an opportunity to prepare whatever mitigating circum-

stances might be appropriate to submit to the jury" (App.E.4). Counsel stated that he was "unable and unprepared to proceed as indicated by the Court this afternoon" (App.E.4). The prosecutor countered that defense counsel understood from the beginning that this was a case in which the state was seeking the death penalty, and therefore the second phase (App.E.5). The prosecutor stated, "I am prepared to proceed with that. I have the witnesses and I urge the Court that we proceed" (App.E.5). Defense counsel replied:

> Your Honor, the Defendant has no witnesses and is not prepared to present any witnesses this afternoon, and again I urge the Court in all sincerity that the only fair thing to do would be to give the Defendant an opportunity to assemble whatever mitigating circumstances are available to him for presentation to the jury.
>
> The case has proceeded rapidly as it could, under the circumstances, there is no untoward delay that I think the Defendant has been responsible for or counsel has been responsible for, except for at the beginning when the Court graciously granted a continuous [sic] because of my physical condition. But I think it would be grossly unfair to require us to proceed this afternoon with the penalty phase.
>
> (App.E.5-6).

The trial judge said he would take the motion for continuance under advisement during the noon recess, but that it would be well for both parties to assume that the trial would resume at three o'clock (App.E.6). When court re-convened at three, the judge announced his ruling denying a continuance of the penalty phase (App.E.6).

Following the penalty phase, at which the defense called no witnesses, the jury recommended that the death penalty be imposed. The trial court ordered a presentence investigation, and on March 30, 1981 sentenced petitioner to death.

The Supreme Court of Florida, on September 8, 1983, affirmed petitioner's conviction and death sentence. (App.A). In a 4-2 decision, the majority held, inter alia, that the trial court did not abuse his discretion in denying a continuance of the penalty phase (App.A.5-6). Justice McDonald, joined in dissent by Justice Overton, wrote:

> I agree with the affirmance of Williams' conviction but conclude that his sentence should be vacated and a new sentencing proceeding ordered. It appears on the face of the record that Williams' trial counsel was totally unprepared for the sentencing proceedings and thus Williams was not afforded his right of effective assistance of counsel at this critical proceeding. I would not await a collateral 3.850 motion since no further evidence is needed to establish these facts.
>
> (App.A.7)

Petitioner's timely motion for rehearing was denied on November 8, 1983 (App.B and C).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

In his brief on appeal, petitioner argued 1) that the trial court's denial of petitioner's request for a continuance of the penalty phase, in the face of defense counsel's uncontroverted representation that he was wholly unprepared to present any evidence in mitigation, deprived petitioner of his Sixth Amendment right to counsel reasonably likely to render effective assistance [1] (App.F.1-14, see especially App. F.5-9), and 2) that the representation actually rendered by defense counsel in the penalty phase was constitutionally inadequate (App.F.2-5,11-13; App.G.8-11). With regard to the latter argument, petitioner contended that the general rule stated in State v. Barber, 301 So.2d 7 (Fla. 1974) [i.e., that a claim of ineffective assistance of counsel cannot be raised on direct appeal because it has not been ruled upon by the trial court] was inapplicable, because in the instant case the trial court did rule on petitioner's claim of ineffective assistance, with the express intention of preserving the issue for appellate review (see App.F.6-7, App.A.3-4,6-7).

The Florida Supreme Court rejected petitioner's argument that the trial court's refusal to grant a continuance of the penalty phase deprived him of his Sixth Amendment right to

---

[1] See e.g. United States v. Gray, 565 F.2d 881 (5th Cir. 1978); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974).

counsel reasonably likely to render effective assistance (App.A.5-6). The Florida Supreme Court further concluded that, notwithstanding the trial court's purported ruling on petitioner's claim that defense counsel actually rendered ineffective representation, that issue was not preserved for appellate review, and must be raised in the trial court pursuant to Florida Rule of Criminal Procedure 3.850 (App.A.6-7). Justices McDonald and Overton dissented on the ground that "[i]t appears on the face of the record that Williams' trial counsel was totally unprepared for the sentencing proceedings", and therefore petitioner was not afforded his right of effective assistance of counsel (App.A.7).

It is important to emphasize that in this petition for writ of certiorari petitioner is <u>not</u> raising the issue as to the ineffectiveness of the actual representation afforded by defense counsel, since he concedes that the procedural question of whether such issue can be litigated on direct appeal or must be raised in a collateral proceeding pursuant to Fla. R.Cr.P. 3.850 is a matter of state law. The Florida Supreme Court's affirmance of petitioner's conviction and sentence is without prejudice to raise the issue of ineffective assistance of counsel pursuant to Rule 3.850, and petitioner intends to do so if necessary. In this petition for certiorari, petitioner is raising only the issue which was decided adversely to him on the merits by the Florida Supreme Court; specifically, whether the trial court's refusal to grant a continuance of the penalty phase deprived him of his Sixth Amendment right to counsel reasonably likely to render effective assistance.

REASONS FOR GRANTING WRIT

QUESTION PRESENTED

QUESTION

THE TRIAL COURT'S REFUSAL TO GRANT A CONTINUANCE OF THE PENALTY PHASE OF A CAPITAL TRIAL, IN THE FACE OF DEFENSE COUNSEL'S UNCONTROVERTED REPRESENTATION THAT HE WAS TOTALLY UNPREPARED TO PRESENT ANY EVIDENCE IN MITIGATION, AND THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE DEATH SENTENCE UNDER THESE CIRCUMSTANCES, VIOLATED PETITIONER'S RIGHT, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, TO COUNSEL REASONABLY LIKELY TO RENDER EFFECTIVE ASSISTANCE.

Petitioner would note at the outset that the issue raised in this petition is closely related to, but not identical to, the issues concerning ineffective assistance of counsel, by reason of the attorney's lack of preparation or failure to investigate potentially applicable defenses or mitigating circumstances, which will be considered by this Court in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982), cert. granted sub. nom. Strickland v. Washington, 462 U.S. __ (1983) and United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982), cert. granted 459 U.S. __ (1983).

This Court has held that the sentencing process in a criminal trial must satisfy the due process clause of the Fourteenth Amendment. Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Sentencing is a critical stage of a criminal proceeding, at which a defendant is constitutionally entitled to the effective assistance of counsel. Gardner v. Florida, supra; Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). A defendant's right to the effective assistance of counsel is particularly crucial in the penalty phase of a capital trial, due to the severity and finality of the death penalty, and due to the special interest of both the defendant and the public in ensuring a reliable sentencing determination in such cases. See Gardner v. Florida, supra; Beck v. Alabama, 447 U.S. 625, 639;

100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Lockett v. Ohio, 438 U.S. 586, 605; 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In Vela v. Estelle, 708 F.2d 954,964-65 (5th Cir. 1983)(a non-capital case), the Fifth Circuit Court of Appeals observed:

> "The sentencing stage of any case, regardless of the potential punishment, is 'the time at which for many defendants the most important services of the entire proceeding can be performed.'" Stanley v. Zant, 697 F.2d 955,963 (11th Cir.1983) (citations omitted). Where the potential punishment is 99 years imprisonment, the sentencing proceeding takes on added importance. While the legal standard of effective representation does not change from case to case, this does not mean that the severity of the sentence faced by a criminal defendant should not be considered in determining whether counsel's performance meets this standard. Watkins, 655 F.2d at 1356. "[T]he number, nature, and seriousness of the charges against the defendant are all part of the 'totality of the circumstances in the entire record' that must be considered in the effective assistance calculus." Id. See Stanley, 697 F.2d at 962-63. Here, Vela was charged with perhaps the most serious of offenses; murder. "Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." Cuyler, 100 S.Ct. at 1715.

The constitutional guarantee of effective assistance of counsel means that an accused is entitled to an attorney reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances. Douglas v. Wainwright, 714 F.2d 1532,1553 (11th Cir. 1983); Vela v. Estelle, supra, at 961; Washington v. Strickland, 693 F.2d 1243,1250 (5th Cir. 1982)(en banc); Herring v. Estelle, 491 F.2d 125,127 (5th Cir. 1974). Under the circumstances of the present case, the trial court's refusal to allow a continuance before commencing the penalty phase of the trial, notwithstanding defense counsel's uncontroverted statements that he was completely unprepared to proceed, was error of constitutional dimension, since defense counsel was clearly not reasonably likely to render reasonably effective assistance. In Pickens

v. Lockhart, 714 F.2d 1455,1467-68 (8th Cir. 1983), the Eighth Circuit Court of Appeals, faced with a similar claim that defense counsel was unprepared to offer any mitigating evidence in the penalty phase of a capital trial, wrote:

> Given the severity of the potential sentence and the reality that the life of Plant's client was at stake, we find that it was incumbent upon Pickens' counsel to offer mitigating proof. There exists no indication in the record that Plant made any tactical decision; it appears much more likely that he abdicated all responsibility for defending his client in the sentencing phase. We cannot view such an abdication as meeting the level of effective assistance required under the sixth amendment.
>
> The error of the district court in evaluating the strategy of Pickens' counsel is that it fails to consider that it is only after a full investigation of all the mitigating circumstances that counsel can make an informed, tactical decision about which information would be the most helpful to the client's case. In the present case, it is undisputed counsel failed to make any investigation whatsoever. It is true counsel may choose not to investigate all lines of defense and may concentrate, for reasons of sound strategy, on another possible line of defense. See Washington v. Strickland, 693 F.2d at 1254-55. We would not fault such a strategy if it were a reasoned choice based on sound assumptions. That is not the situation here. Plant did no investigation into any possible mitigating evidence. He was left with no case to present. A total abdication of duty should never be viewed as permissible trial strategy. Id. at 1252-53; see also Stanley v. Zant, 697 F.2d at 966 ("a showing that counsel's decision to forego evidence was not based on a reasoned tactical judgment will give rise to an ineffective assistance claim")(emphasis original); Brubaker v. Dickson, 310 F.2d 30,39 (9th Cir. 1962)("appellant's defense was withheld...in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all").
>
> It is sheer speculation that character witnesses in mitigation would do more harm than good, 542 F.Supp. at 598-99, and that Pickens was not prejudiced by the omission. Here, counsel's default deprived Pickens of the possibility of bringing out even a single mitigating factor. Mitigating evidence clearly would have been admissible. 542 F.Supp. at 598; Ark.Stat.Ann. §41-1301(4)

> (1977). The jury would have considered it and possibly been influenced by it. See Thomas v. Wyrick, 535 F.2d at 416-17. We find that Pickens was actually and substantially prejudiced in the penalty phase of the case.

See also Douglas v. Wainwright, 714 F.2d 1532, 1556 (11th Cir. 1983); Washington v. Strickland, supra, at 1251-58; Blake v. Zant, 513 F.Supp. 772,779-80 (S.D.Ga. 1981).

In the present case, defense counsel forthrightly informed the trial court that he was unprepared to offer any evidence in mitigation. Both the trial court and the Florida Supreme Court were of the opinion that counsel should have been prepared -- that he had enough time to prepare (see App.A.5) -- but that is relevant only to the question of whether sanctions against the attorney might be appropriate. The fact that counsel should have been prepared does not justify a ruling which resulted in petitioner's being represented in this life-or-death proceeding by an attorney who is, by his own admission, unprepared. Such representation is tantamount to no representation at all. The denial of the requested continuance, where the trial court was clearly on notice that counsel was not reasonably likely to offer effective assistance, sacrificed petitioner's right to a reasoned determination, based on full consideration of the mitigating as well as the aggravating circumstances, of whether the death penalty should be imposed, and was constitutional error of the first magnitude.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD SHERMAN WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

(MEMBER OF THE BAR
OF THIS COURT)

TABLE OF CONTENTS

tions which are not immune from suit under *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979). This holding would be incorrect under our decision in *Neilson*. The district court opinion also reflects that the failure to place warning signs at a railroad crossing which is known to be dangerous and the failure to maintain the railroad crossing are operational-level functions and constitute negligent, tortious conduct, immunity to which is waived by section 768.28, Florida Statutes (1977). This portion of the district court's holding is consistent with our opinions in *Commercial Carrier, Neilson*, and *Ralph v. City of Daytona Beach*, No. 62,094, —— So.2d —— (Fla. Feb. 17, 1983).

[3] We approve the result reached by the district court because this case was presented to the jury on the issue of the petitioner's negligent failure to maintain the railroad crossing and failure to warn motorists of a known dangerous condition. We note that the district court relied in part on the broad language defining "planning" in *Collom v. City of St. Petersburg*, 400 So.2d 507 (Fla. 2d DCA 1981), which we modified in *City of St. Petersburg v. Collom*, 419 So.2d 1082 (Fla.1982).

As modified, we approve the decision of the district court.

It is so ordered.

ALDERMAN, C.J., and BOYD and McDONALD, JJ., concur.

ADKINS and EHRLICH, JJ., concur in result only.

SHAW, J., concurs specially with an opinion.

SHAW, Justice, specially concurring.

I concur in the result but do not agree that "the district court opinion appears to hold that the failure to upgrade a railroad intersection and the failure to install traffic control devices are operational-level functions which are not immune from suit under *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979)." As I read the opinion, the district court held that DOT could not claim immunity under the label of "planning function" when, *prior to the accident*, DOT knew that the installed traffic control devices created an admittedly dangerous railroad crossing. On the facts of the case, the district court was simply rejecting the argument that everything is planned, therefore, everything is immune. As the district court put it, "this analysis is unhelpful because every operational activity undertaken by DOT must at some point entail planning, which would cloak the department in absolute immunity." *Department of Transportation v. Webb*, 409 So.2d 1061, 1064 (Fla. 1st DCA 1982). *See also Foley v. State Department of Transportation*, 422 So.2d 978 (Fla. 1st DCA 1982), on this point of law, which rejected the same argument in another factual context.

Richard Sherman WILLIAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 60546.

Supreme Court of Florida.

Sept. 8, 1983.

Rehearing Denied Nov. 4, 1983.

Defendant was convicted of first-degree murder and sentenced to death in the Circuit Court, Bradford County, R.A. Green, Jr., J., and defendant appealed. The Supreme Court, Adkins, J., held that: (1) there was no jury confusion on issue of whether verdict must be unanimous as to degree as well as to guilt; (2) trial judge acted within his bounds when he refused to grant defendant's motion for continuance of penalty phase of prosecution; (3) death was proper sentence; and (4) defendant's

claim of ineffective assistance of counsel was not properly before Supreme Court.

Affirmed.

McDonald, J., filed opinion concurring in part and dissenting in part, in which Overton, J., concurred.

1. Criminal Law ⇐1020

Supreme Court has jurisdiction under State Constitution to hear appeal from final judgment of Circuit Court imposing death penalty. West's F.S.A. Const. Art. 5, § 3(b)(1).

2. Criminal Law ⇐872½

There was no confusion on part of jury which deprived defendant of his right to unanimous verdict as to degree as well as to guilt in capital case as guaranteed by both Federal and State Constitutions and by State Rule of Criminal Procedure where jury withdrew its question as to whether its verdict must be unanimous as to degree as well as to guilt, returned verdict explicitly stating that there was unanimous agreement that defendant was guilty of murder in the first-degree, and was subsequently polled as to its decision, with each juror personally accepting responsibility for verdict. West's F.S.A. RCrP Rule 3.440.

3. Criminal Law ⇐586

Granting or denial of motion for continuance is within discretion of trial court.

4. Criminal Law ⇐586

Principle that granting or denial of motion for continuance is within discretion of trial court remains intact even in situations where death penalty is of issue.

5. Criminal Law ⇐590(1)

Trial judge acted within his bounds when he refused to grant defendant's motion for continuance of penalty phase of prosecution for first-degree murder where decision to deny such motion was rendered subsequent to two-hour recess, a period of time sufficient to review relevant circumstances surrounding defendant's motion, defendant's counsel had been aware, since his appointment 11 weeks prior to trial, that case was one in which death penalty would be sought, defendant, in presenting his motion for continuance, never offered reasons for his unpreparedness, and defendant failed to demonstrate due diligence in locating mitigating witnesses and never alleged that motion was made in good faith and not for delay only.

6. Criminal Law ⇐577.1

Eleven weeks' notice was adequate time to prepare for both trial and sentencing phases of prosecution of first-degree murder in which death penalty would be sought.

7. Criminal Law ⇐584

Denial of continuance of penalty phase of trial for first-degree murder did not prevent trial court from familiarizing itself with potential applicable mitigating circumstances where, immediately following penalty phase, trial court ordered presentence investigation and issued judgment and sentence after reviewing presentence report.

8. Homicide ⇐354

Facts that defendant was incarcerated at State Prison from conviction of second-degree murder, a crime of violence, and that there were no applicable mitigating factors in slaying of fellow prisoner were sufficient to sustain sentence order imposing death as sentence for conviction of first-degree murder. West's F.S.A. § 921.141(5)(a, b).

9. Criminal Law ⇐1035(7)

As general rule, claim of ineffective assistance of counsel cannot be raised for first time on direct appeal. U.S.C.A. Const. Amend. 6.

10. Criminal Law ⇐1064(6)

Where defendant's letter to trial judge after motion for new trial had been filed presented "bald assertions" of ineffective assistance of counsel totally devoid of factual support, and neither State nor court-appointed trial counsels were granted opportunity to refute such unsworn assertions, claim of ineffective assistance of counsel was not properly before Supreme Court on appeal from conviction of first-degree mur-

der and imposition of death penalty, even though trial judge received such letter prior to sentencing and stated that defendant's argument would be preserved for further appellate review. U.S.C.A. Const.Amend. 6.

Steven L. Bolotin, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen. and Richard A. Patterson, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

[1] This case is before this Court on appeal of a judgment from the Eighth Judicial Circuit, Bradford County. Williams was convicted of first-degree murder and received the death penalty. He appeals the conviction and the attendant sentence. We have jurisdiction under article V, section 3(b)(1), Florida Constitution. Both the judgment and the sentence are hereby affirmed.

Evidence at trial established the facts to follow. In the early morning of July 16, 1980, Roy Huff began delivering breakfast to the inmates on Q-wing of Florida State Prison. Huff, himself an inmate, occupied the position of "runner" and was assigned by prison officials to bring food to the various cells. As Huff prepared to hand defendant/Williams his food tray, Williams brandished a handcrafted spear, shoved the shaft through the bars, and lunged toward the man. Huff was struck in the midsection and shortly thereafter died from the stab wound.

Correctional Officer Dearing was working the midnight–8:00 a.m. shift on Q-wing the night of the slaying. Dearing watched as Huff fed cells 1 and 2. As Huff approached Williams' cell he saw the man (Huff) fall back from the door clutching his chest. Later Dearing heard Huff state, "Bushax has stabbed me." (Bushax is defendant's nickname.) Dearing and Sergeant Gann reached the injured inmate whereupon Gann inquired, "You know who did it, don't you, Huff?", and Huff replied, "Yes sir, Bushax Williams."

Thereafter prison inspector Edward Sands took Williams from his cell and interviewed him as a suspect in the Huff killing. Prior to any dialogue between prisoner and inspector, Williams was advised of his *Miranda* rights, of which he executed an effective waiver. During the interview Williams gave an account of the slaying, explained how he had fashioned the murder weapon, and told where he had disposed of the weapon after the stabbing. Following defendant's directions, prison officials located the handcrafted spear.

At the trial in February of 1981 Williams was found guilty of first-degree murder as charged. The court then adjudged the defendant guilty and announced that the penalty phase would begin after a lunch break of two hours. Defense counsel moved for a continuance of the penalty phase in order to prepare for submission of appropriate mitigating circumstances. The trial judge said he would take the motion under advisement, but it would be well for both parties to assume that the penalty phase would begin immediately after the two-hour recess. When the court reconvened, the judge announced his ruling denying a continuance of the penalty phase.

During the ensuing penalty phase defense counsel presented no witnesses. Thereafter the jury returned a recommendation that the death penalty be imposed and a pre-sentence investigation was ordered by the court.

A defense motion for new trial was filed on February 26, 1981, after which defendant contacted Judge Green *by letter* disavowing the motion and stating his belief that defense counsel had provided ineffective representation. At the sentencing proceeding the court stated that defendant's letter would become part of the amended motion for new trial and specifically ruled as follows:

> The allegations of incompetence of counsel made by the Defendant raised prior and during trial and again reraised at the conclusion of trial, but prior to senteno-

ing, are each considered by the Court and the allegations thereby specifically overruled and the motion denied.

My purpose in this statement is to make abundantly clear for further appellate review that the argument was preserved by the Defendant prior to the time of sentencing.

At the conclusion of the pre-sentence investigation the court found two aggravating circumstances—that defendant was under sentence of imprisonment for second-degree murder, and that he had been convicted of second-degree murder, a crime of violence. The court found no mitigating circumstances, and thereafter sentenced Williams to death by electrocution.

[2] Williams first contends that the trial court failed to ascertain that the jury understood that its verdict must be unanimous as to "degree" as well as to "guilt". He further argues that as a result of such failure there was "manifest confusion" on the part of the jury which deprived him of his right to a unanimous verdict in a capital case as guaranteed by both the United States and Florida Constitutions and by Florida Rule of Criminal Procedure 3.440. After thorough review of the record we find no merit to Williams' contentions.

The alleged *confusion* in the case sub judice stems from the following interchange between the trial judge and jury foreman:

THE COURT: Ladies and gentlemen, about eleven forty-three I was handed a note by Mr. Enice, which is on a pad that I instructed him to take into the jury room. The note reads:

"Does the jury have to have unanimous agreement for the degree along . . ."

And then there is an abbreviation that I don't understand.

" . . . guilt charge?"

The abbreviation is a C with a dash over it.

First question is, is that a valid communication from the jury?

JUROR: Yes.

THE COURT: The second question is, what is the abbreviation?

JUROR: With.

THE COURT: So the question is:

"Does the jury have to have unanimous agreement with the degree along with the guilt charged?"

JUROR: We found the answer.

THE COURT: You did?

JUROR: Yes, sir.

THE COURT: Then you don't need it answered.

JUROR: Yes, sir.

THE COURT: You may retire to deliberate further.

Here, after the court verbalized the question, "Does the jury have to have unanimous agreement with the degree along with the guilt charged?", the jury foreman responded, "We found the answer". The foreman expressly represented to the judge that the jury had found the answer, and that it was no longer necessary for the court to supply it. We find *no* evidence of "manifest confusion" emanating from this interchange. In fact, the judge showed sound judgment by not delving into the matter. For the trial judge to intervene and supply answers to questions not properly before the court would create just the "manifest confusion" which our judicial system seeks to avoid.

The unanimity and integrity of the jury's verdict is further supported by the *verdict form* returned by the jury, which provided:

VERDICT

We, the jury, find the Defendant Richard Sherman Williams, guilty of murder in the first degree as charged in the indictment, *so say we all.*

(Emphasis added.) The record shows that after this verdict was published the jury was polled, with each juror personally accepting responsibility for the verdict. These factors alone firmly establish the jury's understanding that its verdict must be unanimous as to degree as well as to guilt.

In addition, the jury had in its possession during deliberations a written copy of the judge's instructions, which provided in pertinent part:

> In the case of first degree murder, if you find a conviction of first degree murder it will be necessary for you to consider and recommend to the Court which of the two penalties, by a majority vote, you recommend should be imposed. The imposition of the penalty with those two choices and your recommendation lie solely with the Court.
>
> *Your verdict finding the Defendant either guilty or not guilty must be unanimous.* The verdict must be the verdict of each juror, as well as of the jury as a whole.
>
> The indictment charges the crime of: murder in the first degree, which includes, as a matter of law, the lesser crimes of:
>
> 1. not guilty;
> 2. guilty of murder in the first degree as charged in the indictment;
> 3. guilty of murder in the second degree;
> 4. guilty of murder in the third degree; or
> 5. guilty of manslaughter.

(Emphasis added.) These instructions, without question, mandate that the verdict, which contains *guilt and degree*, be unanimous. Moreover, these same instructions provided the correct answer to the jury's *withdrawn question*, and it is logical to assume that the jury withdrew its question after referring to the instructions.

In review, the jury withdrew its question, returned a verdict explicitly stating that there was unanimous agreement that Williams was guilty of murder in the first-degree, and was subsequently polled as to its decision. These measures, when viewed in total, more than dispel all traces of the alleged jury confusion.

Williams also challenges the sentence, contending that the trial court abused its discretion by refusing to grant a continuance of the penalty phase when the defense counsel represented that he was unprepared to present any evidence of mitigating circumstances.

[3-6] The granting or denial of a motion for continuance is within the discretion of the trial court. *Duncan v. State*, 350 So.2d 525 (Fla. 3d DCA 1977); *Mills v. State*, 280 So.2d 35 (Fla. 3d DCA 1973); *Douglas v. State*, 216 So.2d 82 (Fla. 3d DCA 1968). This principle remains intact even in situations where the death penalty is of issue. *See Cooper v. State*, 336 So.2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). This Court in *Cooper* announced:

> While death penalty cases command our closest scrutiny, it is still the obligation of an appellate court to review *with caution* the exercise of *experienced discretion* by a trial judge in matters such as a motion for a continuance.

336 So.2d at 1138 (emphasis added). We find no evidence that the trial judge abused the above mentioned discretion. Appellant moved for a continuance at the conclusion of the guilt phase of the trial. The trial judge's decision to deny the motion was *not* made in haste. The decision to deny was rendered subsequent to a two-hour recess—a period of time sufficient to review the relevant circumstances surrounding appellant's motion. In our review of the record we find that appellant's counsel had been aware, since his appointment eleven weeks prior, that this was a case in which the death penalty would be sought. Eleven weeks' notice is adequate time to prepare for both the trial and sentencing phases of this litigation. *See Valle v. State*, 394 So.2d 1004, 1008 (Fla.1981). We further find that appellant, in presenting his motion for continuance, never offered reasons for his unpreparedness. Likewise he failed to demonstrate due diligence in locating mitigating witnesses and *never* alleged that the motion was made in good faith and not for delay only. Hence the trial judge acted within his bounds when he refused to grant appellant's motion for continuance. *See Moore v. State*, 59 Fla. 23, 52 So. 971 (1910).

[7] Moreover, and contra to what appellant contends, the denial of the continuance did not prevent the trial court from familiarizing itself with potentially applicable mitigating circumstances. Immediately following the penalty phase of the trial, the trial judge ordered a presentence investigation. After reviewing the presentence report the trial court issued its judgment and sentence order which contained the following:

JUDGMENT AND SENTENCE

The defendant, Richard Sherman Williams, is an inmate at Florida State Prison at Starke, serving a sentence for second degree murder. Roy Huff was also an inmate at Florida State Prison. While Roy Huff was making rounds as a "runaround" in the cellblock in which Richard Sherman Williams was contained, Richard Sherman Williams made a spear out of a homemade knife and a broom handle and proceeded to stab Roy Huff through the door of the cell while Roy Huff was attempting to serve Richard Sherman Williams a meal. Roy Huff died of the stab wounds within a few minutes after they were inflicted.

The case was tried before a jury and a verdict of first degree murder was returned; subsequently the jury recommended death.

The Court finds the following statutory aggravating factors apply in this case:

1. The defendant was under sentence of imprisonment—for murder—when this crime was committed.

2. The defendant had previously been convicted of second degree murder—a crime of violence.

There are no other applicable statutory aggravating factors.

There are no applicable mitigating factors.

(Emphasis added.)

[8] Only after thoroughly familiarizing himself with the presentence investigation report did the trial judge determine that there were *no* applicable mitigating factors. Moreover, the record clearly substantiates the trial judge's finding of the two statutory aggravating circumstances pursuant to sections 921.141(5)(a) and (b), Florida Statutes (1981), respectively. It is undisputed that, at the time of the slaying, the appellant was incarcerated at Florida State Prison from a conviction of second degree murder—a crime of violence.

Accordingly, after careful consideration of the record, including a thorough study of the sentence order, our judgment is that death is a proper sentence.

Williams further submits that in refusing to grant the continuance the trial court deprived him of his right to effective assistance of counsel. We disagree.

[9] As a general rule, a claim of ineffective assistance of counsel cannot be raised for the first time on direct appeal. *Gibson v. State*, 351 So.2d 948 (Fla.1977), cert. denied, 435 U.S. 1004, 98 S.Ct. 1660, 56 L.Ed.2d 93 (1978); *State v. Barber*, 301 So.2d 7 (Fla.1974); *Pinder v. State*, 421 So.2d 778 (Fla. 5th DCA 1982); *Kidwell v. State*, 394 So.2d 526 (Fla. 3d DCA 1981); *Valero v. State*, 393 So.2d 1197 (Fla. 3d DCA 1981). We find no reason to deviate now from this principle.

[10] Here, the appellant improperly attempted to raise the question of ineffective assistance of counsel in an amended motion for a new trial. In so doing, Williams failed to provide the trial court with *sworn to* allegations necessary to prevent unfounded complaints in motions for post-conviction relief. While the trial judge received Williams' letter alleging ineffective assistance of counsel prior to sentencing and stated that defendant's argument would be preserved for further appellate review, this, in itself, does not warrant our present consideration of the issue. "[R]elief cannot be had by appeal until issues of *fact* have been first resolved in the trial court." *Pinder*, 421 So.2d at 779 (emphasis added). After thorough review of the record we find *no* evidence that the ineffective assistance of counsel allegation was sufficiently resolved so as to warrant our review. At most, defendant's letter presented "bald as-

sertions" totally devoid of factual support. *United States v. Rodriguez*, 582 F.2d 1015 (5th Cir.1978). Moreover, neither the state nor the court-appointed trial counsels were granted the opportunity to refute the *unsworn* ineffective assistance of counsel allegation. *United States v. Prince*, 456 F.2d 1070 (5th Cir.1972); *compare, United States v. Phillips*, 664 F.2d 971 (5th Cir.1981), *cert. denied, Meinster v. United States*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). For the above reasons, we find that Williams' claim of ineffective assistance of counsel is not, at present time, properly before this Court.

Accordingly, both the conviction and the attendant sentence are affirmed *without* prejudice to the right of Williams to raise the issue of ineffective assistance of counsel in a proper proceeding pursuant to Florida Rule of Criminal Procedure 3.850.

It is so ordered.

ALDERMAN, C.J., and BOYD and EHRLICH, JJ., concur.

McDONALD, J., concurs in part and dissents in part with an opinion, in which OVERTON, J., concurs.

McDONALD, Justice, concurring in part and dissenting in part.

I agree with the affirmance of Williams' conviction but conclude that his sentence should be vacated and a new sentencing proceeding ordered. It appears on the face of the record that Williams' trial counsel was totally unprepared for the sentencing proceedings and thus Williams was not afforded his right of effective assistance of counsel at this critical proceeding. I would not await a collateral 3.850 motion since no further evidence is needed to establish these facts.

OVERTON, J., concurs.

Theodore HARRIS, Appellant,

v.

STATE of Florida, Appellee.

No. 61343.

Supreme Court of Florida.

Sept. 8, 1983.

Rehearing Denied Nov. 8, 1983.

Defendant was convicted by jury in the Circuit Court, Dade County, Thomas E. Scott, J., of first-degree murder, burglary with an assault, and robbery. Defendant was sentenced to death. Defendant appealed. The Supreme Court held that: (1) defendant's arrest was lawful; (2) there was substantial competent evidence to affirm trial judge and jury's conclusion that defendant's confession was voluntary; (3) prosecutor did not comment during closing argument on defendant's failure to testify at trial; (4) trial judge properly denied defendant's requested jury instruction on inculpatory statements; (5) defendant knowingly and intelligently waived his right to have instructions on necessarily included lesser offenses given to jury; (6) prosecutor's improper comment during closing argument in sentencing hearing was not so prejudicial as to require mistrial; and (7) trial judge's improper finding of certain aggravating circumstance did not require new sentencing hearing.

Convictions and sentences affirmed.

1. Criminal Law ⇐213

Even assuming there was deliberate falsity concerning blood typing and evidence on that regard in police officer's sworn affidavit upon which warrant for defendant's arrest was issued, remaining contents of affidavit were legally sufficient to support finding of probable cause for issuance of warrant for defendant's arrest.

IN THE SUPREME COURT OF FLORIDA

RICHARD SHERMAN WILLIAMS, :

Appellant, :

vs. : CASE NO. 60,546

STATE OF FLORIDA, :

Appellee. :

:

MOTION FOR REHEARING

Appellant, RICHARD SHERMAN WILLIAMS, pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, hereby moves this Court for rehearing in the above-styled case, and as grounds therefor states:

1. Appellant contended on appeal that the trial court abused its discretion by refusing to grant a continuance of the penalty phase when defense counsel represented that he was unprepared to present any evidence of mitigating circumstances. In rejecting appellant's argument, this Court stated, inter alia:

> Moreover, and contra to what appellant contends, the denial of the continuance did not prevent the trial court from familiarizing itself [e.s.] with potentially applicable mitigating circumstances. Immediately following the penalty phase of the trial, the trial judge ordered a presentence investigation.
>
> * * * * * *
>
> Only after thoroughly familiarizing himself with the presentence investigation report did the trial judge determine that there were no applicable mitigating circumstances.
>
> Williams v. State, __So.2d__ (Fla. 1983) (case no. 60,546, opinion filed September 8, 1983) (1983 FLW 333, at 335)

2. Appellant believes that, in affirming his death sentence notwithstanding defense counsel's admitted unpreparedness and the trial court's refusal to grant a continuance of the penalty phase, this Court may have overlooked or misapprehended the effect of the trial court's ruling upon the vital role of the jury in capital sentencing. The Court may also have misapprehended

the constitutional importance of the adversary presentation by counsel of the aggravating and mitigating circumstances in a capital case, as opposed to the (at best) neutral viewpoint of a PSI.

3. At the close of the penalty phase, in which the defense presented no witnesses, and after the jury had returned its recommendation of death, the trial court announced:

> Richard Sherman Williams, the jury having found you to be guilty and having made its recommendation as to penalty, this Court will request and obtain upon you a pre-sentence investigation and look into your background prior to the disposition of the case.
>
> (T.682)

The PSI report was prepared, pursuant to Fla.R.Cr.P. 3.710, by an officer of the probation and parole commission. This officer's function is to advise the Court and to recommend a disposition of the case; his perspective is that of law enforcement and administration of justice. He is not an advocate - and certainly not an advocate on behalf of the defendant - and he is not a legal representative. It is not his role to persuade the judge to impose a life sentence rather than the death penalty, and it is not his obligation to try to show the judge and jury "something good" about the defendant [see Blake v. Zant, 513 F.Supp. 772, 779 (S.D. Ga. 1981)]. The PSI, far from being an adequate substitute for effective assistance of counsel for the purpose of presenting matters in mitigation, as the opinion in this case intimates, was a law-enforcement oriented document which prominently featured Williams' lengthy juvenile, criminal, and prison disciplinary record (S.R. Nov. 19, 1981, p. 2-5).

4. Defense counsel's failure to investigate potential mitigating circumstances and his failure to prepare for the penalty phase of the trial not only impaired the trial court's ability to fairly assess the aggravating and mitigating circumstances, but even more importantly, it rendered the penalty proceeding before the jury an empty charade. The trial court's refusal to grant a continuance, in the face of counsel's uncontradicted

representation that he was wholly unprepared to present any evidence of whatever mitigating circumstances might be applicable, deprived appellant of any meaningful opportunity to persuade the jury to return a life recommendation. This Court has recognized on numerous occasions that the jury's recommendation reflects the conscience of the community and is entitled to great weight. See e.g. Richardson v. State, __So.2d__ (Fla. 1983) (case no. 61,924, opinion filed September 1, 1983) (1983 FLW 327, 328); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Tedder v. State, 322 So.2d 908 (Fla. 1975). In Richardson v. State, supra, decided one week prior to the instant case, this Court commented:

> It is a defendant's right to have a jury advisory opinion, and absent a voluntary and intelligent waiver of that right, a judge may not frustrate this important jury function. Lamadline v. State, 303 So.2d 17 (Fla. 1974). We cannot condone a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating and mitigating factors after all parties have agreed on the appropriate evidence to be considered.
>
> (1983 FLW at 328)

In the instant case, appellant's right to full and fair consideration of the aggravating and mitigating factors, by the judge and especially by the jury, was impaired - not subtly - by his own attorney's unexplained failure to investigate and prepare, and by the trial court's decision to require counsel to proceed unprepared rather than to continue the penalty phase. Appellant certainly did not waive his right to a jury recommendation, either voluntarily and intelligently or otherwise. To the contrary, he protested throughout the trial and afterward that he was being represented ineffectively. The bottom line is that appellant did not have, and still has not had, a fair opportunity to present any matters in mitigation or to persuade a jury or judge that he should not be sentenced to death. That being the case, his sentence of death cannot be carried out without violating the Eighth Amendment to the U. S. Constitution. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

5. This Court affirmed appellant's conviction and death sentence without prejudice to his right to raise the issue of ineffec-

tive assistance of counsel in a proceeding pursuant to Fla.R.Cr.P. 3.850. Justice McDonald (joined by Justice Overton) dissented in part, and said:

> It appears on the face of the record that Williams' trial counsel was totally unprepared for the sentencing proceedings and thus Williams was not afforded his right of effective assistance of counsel at this critical proceeding. I would not await a collateral 3.850 motion since no further evidence is needed to establish these facts.

Based upon the well reasoned dissenting opinion of Justice Overton in Sobel v. State, __So.2d__(Fla. 1983)(case no. 61,960, opinion filed July 21, 1983)(1983 FLW 255), and particularly in light of the facts that (1) appellant complained both during and after the trial and penalty proceeding that he was being afforded ineffective representation, (2) defense counsel forthrightly admitted his lack of preparation for the penalty phase (thus obviating the reason behind Rule 3.850's requirement that allegations of ineffectiveness be sworn to by the defendant, and making it unnecessary to grant the lawyer the opportunity to refute the claim of ineffectiveness which he has just admitted), (3) defense counsel moved for a continuance of the penalty phase, thus affording the trial court an opportunity to ensure that counsel's unpreparedness would not prejudice appellant's right to a fair penalty hearing, and (4) the trial court purported to rule on appellant's claims of ineffective assistance for the express purpose of preserving these issues for appellate review, appellant respectfully urges this Court to reconsider its position on this matter. On several recent occasions, justices of this Court and the U. S. Supreme Court have cast a disapproving eye upon protracted collateral proceedings in capital cases, essentially on the theory that "justice delayed is justice denied" and a defendant should not be allowed to postpone his inevitable execution by raising issues which could have been resolved earlier. See e.g. McCrae v. State, __So.2d__(Fla. 1983)(case no. 63,797, opinion filed September 15, 1983)(Alderman, C.J. concurring in result); Barefoot v. Estelle, __U.S.__, 77 LEd2d 1090, 1100 (1983); Gray v. Lucas, __U.S.__(1983)(33 Cr.L. 4156). This principle cuts both

ways. Clearly, through no fault of his own, appellant has not had a fair penalty hearing before a jury and judge, and just as clearly, he is constitutionally entitled to one. As this Court observed in Castor v. State, 365 So.2d 701, 703 (Fla. 1978), "Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually." In the present case, the trial court had an opportunity to cure the constitutional error - deprivation of the right to effective assistance of counsel in the penalty phase - before it occurred, by granting a continuance and (if he deemed it appropriate) imposing sanctions upon counsel for his failure to prepare. This Court has one final opportunity on rehearing to cure the error by ordering a new penalty proceeding. As Justices McDonald and Overton recognized, no further factual development is necessary to demonstrate that appellant is constitutionally entitled to the relief he requests. A Rule 3.850 proceeding will entail the needless expenditure of time, public funds, and judicial resources, and the ultimate result will necessarily be the same.

WHEREFORE, appellant respectfully requests that this Court grant his motion for rehearing.

Respectfully submitted,

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Richard Patterson, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to appellant, Richard Sherman Williams, P. O. Box 747, Starke, Florida 32091 on this 23rd day of September, 1983.

Steven L Bolotin

STEVEN L. BOLOTIN

Supreme Court of Florida

FRIDAY, NOVEMBER 4, 1983

RICHARD SHERMAN WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee.	*	CASE NO. 60,546 Circuit Court No. 80-240-CF (Bradford)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and EHRLICH, JJ., concur
McDONALD, J., dissents

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. Gilbert S. Brown, Clerk
Hon. R. A. Green, Jr., Judge

Steven L. Bolotin, Esquire
Richard Patterson, Esquire

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 254, ch. 19554, 1939; CGL 1940 Supp. 8883(264); s. 121, ch. 26-329.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 254, ch. 19554, 1939; CGL 1940 Supp. 8883(267); s. 122, ch. 26-329.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

THE COURT: You may retire to deliberate further.

(Thereupon, court was at ease awaiting the verdict; whereupon, at one fifteen p.m., the following proceedings were held:)

THE COURT: Ladies and gentlemen, have you arrived at a verdict?

JUROR: Yes, sir.

THE COURT: Mr. Eunice, give the verdict to the Court, please.

Madame Clerk, publish the verdict.

VERDICT:

In the Circuit Court of Florida, Eighth Judicial Circuit, in and for Bradford County. Case No. 80-240-CF.

State of Florida, Plaintiff, versus Richard Sherman Williams, Defendant.

Verdict:

We, the jury, find the Defendant, Richard Sherman Williams, guilty of murder in the first degree, as charged in the indictment.

So say we all.

Dated at Starke, Bradford County, Florida, this 20th day of February, A.D., 1981.

Signed, Jennifer Elaine Jockel, foreman.

THE COURT: Poll the jury, Madame Clerk.

(Thereupon, each juror was asked if this was their verdict and each juror answered in the affirmative.)

THE COURT: Record the verdict.

Richard Sherman Williams, you being found guilty by a jury of the offense of first degree murder, I now adjudge you guilty of that offense.

Take your seat.

Ladies and gentlemen, under the procedures we will soon commence the second phase of these proceedings in which the jury will be asked to recommend the disposition of the case. Prior to that commencing, however, I will ask Deputy Eunice to give you your noon meal.

Mr. Eunice, please take the jury to lunch, I would ask that they be back in the jury room at three p.m. It will be my intention to conduct the proceedings at that point until conclusion.

Ladies and gentlemen, the verdict you have rendered is recorded. The advisory verdict you will be asked to reach later will have to be ruled on by you by a majority vote of your number. However, pending the return and beginning of those proceedings, I do now reinstate the previous instructions that I gave you. Do not continue to discuss the case among yourselves at this point. No one may discuss the case in your presence or before you or to you except when you come back to court in open proceedings.

You will be the guest of the county for the noon meal and when you return the proceedings will commence.

Mr. Eunice, take the jury to their noon meal.

As soon as the jury clears the courtroom we will recess for lunch.

(Thereupon, the jury retired.)

MR. TUTCH: Your Honor, the Defendant moves the Court to continue the penalty phase of the proceedings until a day subsequent to today in order to allow the Defendant an opportunity to prepare whatever mitigating circumstances might be appropriate to submit to the jury.

To require him to proceed at three o'clock, I believe is what the Court said, today would prejudice the Defendant's rights to fairly and fully present any mitigating circumstances that might be appropriate to submit to the jury.

This case has moved rather rapidly and has had some unusual circumstances to arrive and counsel is just unable and unprepared to proceed as indicated by the Court this afternoon, and I think it would be only fair and reasonable that such a continuance or the scheduling of the penalty phase would be appropriate.

MR. ELWELL: Your Honor, if I may briefly,

THE COURT: Yes, sir.

MR. ELWELL: It's been the posture of this case from its inception and, or course, from Mr. Futch's appointment, that there would be at least for the State Attorney's Office no negotiations. So out front it has been a case that the State intended and had announced its intentions to seek the second phase. There were motions filed by the Defense going towards that second phase and various and numerous discussions that that second phase would be proceeded with by the State.

I am prepared to proceed with that. I have the witnesses and I believe the phase itself is appropriate and I urge the Court that we proceed.

MR. FUTCH: Your Honor, the Defendant has no witnesses and is not prepared to present any witnesses this afternoon, and again I urge the Court in all sincerity that the only fair thing to do would be to give the Defendant an opportunity to assemble whatever mitigating circumstances are available to him for presentation to the jury.

The case has proceeded rapidly as it could,

under the circumstances, there is no untoward delay that I think the Defendant has been responsible for or counsel has been responsible for, except for at the beginning when the Court graciously granted a continuous because of my physical condition. But I think it would be grossly unfair to require us to proceed this afternoon with the penalty phase.

THE COURT: Counsel, I will take your motion for continuanceunder advisement during the noon recess. However, it would be well for counsel for both parties at this point to anticipate that we will be resuming at three o'clock..

We will recess until three.

(Thereupon, the luncheon recess was had; whereupon, at three p.m. the following proceedings were held:)

THE COURT: The record reflects the motion made at the close of the proceedings before lunch, which was taken under advisement. The Court has ruled contrary to the position of the movant.

348 So.2d 599, 600 (Fla. 4th DCA 1977); Berry v. State, 298 So.2d 491, 493 (Fla. 4th DCA 1974) (fundamental error).

In view of the finality of the death penalty, and the special importance of a reliable determination of guilt in cases in which such penalty may be imposed (Beck v. Alabama, supra), the principles of the foregoing cases apply here with added vigor. Because we cannot know, as a result of the trial court's failure to dispel the jury's confusion, whether their verdict finding the defendant guilty of first degree murder was unanimous, his conviction should be reversed for a new trial.

ISSUE II

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT A CONTINUANCE OF THE PENALTY PHASE WHEN DEFENSE COUNSEL REPRESENTED THAT HE WAS UNPREPARED TO PRESENT ANY EVIDENCE OF MITIGATING CIRCUMSTANCES; THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On January 26, 1981, defense counsel, Mack S. Futch, filed a motion to postpone the advisory sentencing proceedings, in the event of a first degree murder conviction (R-36-37). In this motion, he represented that the defendant, should he be convicted, desired to present testimony which might include out of town witnesses, or witnesses who would require prior notification (R-36). A written notation appears on the face of the motion indicating that the court denied it pre-trial (R-36).

At the conclusion of the guilt phase of the trial, the court announced that the penalty phase would begin at 3:00 p.m., after a lunch break (T-637). Defense counsel moved for a continuance to

permit the defendant "an opportunity to prepare whatever mitigating circumstances might be appropriate to submit to the jury" (T-628). Counsel stated that he was "unable and unprepared" to proceed with the penalty phase as indicated by the court (T-628). He did not volunteer any cause for his lack of preparation, and the court did not inquire. The prosecutor urged the court to proceed with the penalty phase that afternoon, stating that he was prepared and had his witnesses ready,[9] and that Mr. Futch had known from the beginning that this was a case in which the state would be seeking the death penalty (T-629).

Defense counsel repeated that he was unprepared, and urged that "the only fair thing to do would be to give the defendant an opportunity to assemble whatever mitigating circumstances are available to him for presentation to the jury" (T-629). The court said he would take the motion under advisement during the noon recess, but that it would be well for both parties to assume that the penalty phase would proceed as scheduled (R-630). At 3:00 p.m., the court announced his ruling denying a continuance, and the penalty phase commenced.

Defense counsel's motion for compensation, filed February 24, 1981, indicates that he spent the lunch break of approximately two hours preparing for the penalty phase (R-79-80). He was able to review the inmate jackets of the defendant and Roy Huff, as they had been brought to court by Doyle Kemp pursuant to the prosecution's

[9]The prosecution called only one witness in the penalty phase, Doyle Kemp, inmate records supervisor at Florida State Prison, through whom it introduced into evidence commitment papers showing that the defendant was under sentence of imprisonment for second degree murder at the time of the Huff killing (R-632-641, 646).

subpoena duces tecum (R-79, R-654). In so doing, defense counsel evidently found the 1977 Union Correctional Institution memorandum which revealed that Roy Huff was apprehended with a concealed knife after having threatened to kill someone (S.R. Dec. 30, 1981, p.21; T-643-44).

This last minute discovery proved to be the only evidence submitted by the defense in the penalty phase (T-643, 646). Defense counsel stated that, in view of the court's denial of a continuance, the only possible witness on behalf of the defendant would be the defendant himself (T-646-47). As he had at trial, the defendant declined to testify (T-647-49).

There was virtually nothing defense counsel could have done, no matter how competent or well-prepared he might be, to prevent the state from establishing beyond a reasonable doubt the twin aggravating circumstances that the defendant was under sentence of imprisonment and that he had previously been convicted of a violent felony. Therefore, in order to have any realistic chance of preventing imposition of the death penalty, the defense needed to persuade the jury and the court that these aggravating circumstances were outweighed by the mitigating circumstances. (See Arango v. State, ___ So.2d ___ (Fla. 1982) (Case No. 59,678, opinion filed January 21, 1982) (1982 FLW 38). It was virtually imperative that the defense establish at least one mitigating circumstance. See Dixon v. State, 283 So.2d 1, 9 (Fla. 1973); Demps v. State, 395 So.2d 501, 506 (Fla. 1981); Christopher v. State, 407 So.2d 198, 203 (Fla. 1981) (where there exist one or more aggravating circumstances, counterbalanced by no mitigating circumstances, death is presumed to be the proper sentence).

See also, e.g., Armstrong v. State, 399 So.2d 953, 963 (Fla. 1981); Enmund v. State, 399 So.2d 1362, 1373 (Fla. 1981); White v. State, 403 So.2d 331, 339 (Fla. 1981); Tafero v. State, 403 So.2d 355, 362 (Fla. 1981). In expressing to the trial court that he was unprepared, and in asking for a continuance to allow the defendant "an opportunity to prepare whatever mitigating circumstances might be appropriate . . . " (T-628) [or, later, requesting "an opportunity to assemble whatever mitigating circumstances are available . . . (T-629)], defense counsel was telling the court that he did not know what evidence might be available in mitigation, or whether there was any. Contrast Gibson v. State, 351 So.2d 948, 950 (Fla. 1977) ("It is probable that appellant's counsel offered nothing in mitigation because there was nothing to offer"].

Defense counsel was thus forced by his own lack of preparation to rely entirely on a rather desultory argument to the jury. He referred to the U.C.I. memorandum to show that Roy Huff was a violent and dangerous individual (T-664-65). He asked the jury to find as mitigating circumstances (1) that the defendant was under the influence of extreme mental or emotional disturbance, and (2) that his capacity to conform his conduct to the requirements of law were substantially impaired. He argued that these mitigating circumstances were established by the "possible effect" of six and one half years in lock-up on a person's mind (T-666-67). Obviously, he had no expert witnesses to substantiate either the "possible effect" of prolonged confinement, or its actual effect on the defendant. Nor did he have any lay witnesses to describe the defendant's actual behavior. Defense counsel's only evidentiary support for these mitigating circumstances

was Inspector Sands' answer on cross-examination during the guilt phase that "[t]here have been cases where prolonged confinement has caused inmates to act irrationally, yes, sir" (T-481, 668). The defense's inability to connect its nebulous argument to this defendant had already been anticipated by the prosecutor, who pointed out the deficiency to the jury (T-658). Defense counsel closed his argument by calling the prosecutor "blood thirsty" and suggesting that, in view of the character of the deceased, a life sentence would be appropriate (T-669).

If defense counsel had chosen such an approach to the penalty phase as a matter of strategy, perhaps his decision could be defended. If he had failed to offer any evidence in mitigation because he had concluded, after proper investigation, that none existed, he could not be faulted. Clearly, neither of these were the case. Due to his own lack of preparation, and to the trial court's refusal to grant a continuance, defense counsel had no alternative but to "wing it". As a result, the defendant's constitutional right to the effective assistance of counsel was sacrificed.

The sentencing process in a criminal trial must satisfy the Due Process Clause of the U.S. Constitution. Gardner v. Florida, 430 U.S. 349, 358 (1977). Sentencing is a critical stage of a criminal proceeding, at which a defendant is constitutionally entitled to the effective assistance of counsel. Gardner v. Florida, supra; Mempa v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967); see Billions v. State, 399 So.2d 1086 (Fla. 1st DCA 1981); Shue v. State, 386 So.2d 1256 (Fla. 5th DCA 1980); Evans v. State, 163 So.2d 520 (Fla. 2nd DCA 1964). A defendant's right to the effective

assistance of counsel is particularly crucial in the penalty phase of a capital trial, due to the severe and final nature of the death penalty, and due to the special interest of both the defendant and society in ensuring a reliable sentencing determination in such cases. See Gardner v. Florida, supra; Beck v. Alabama, 447 U.S. 625, 639 (1980); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Blake v. Zant, 513 F.Supp. 722, 779 (S.D. Ga. 1981); Voyles v. Watkins, 489 F.Supp. 901, 910-12 (N.D. Miss. 1980); State v. Myles, 389 So.2d 12, 30 (La. 1979). In Florida, and in the federal Fifth Circuit (and, presumably, in the new Eleventh Circuit as well), the standard for evaluating the constitutional adequacy of counsel's performance is whether the attorney was reasonably likely to render and did render reasonably effective counsel based on the totality of the circumstances.[10] Vagner v. Wainwright, 398 So.2d 448 (Fla. 1981); Meeks v. State, 382 So.2d 673 (Fla. 1980); United States v. Gray, 565 F.2d 881 (5th Cir. 1978); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974).

As a general rule, a claim of ineffective assistance of counsel cannot be raised on direct appeal. See e.g. State v. Barber, 301 So.2d 7 (Fla. 1974); Gibson v. State, 351 So.2d 948 (Fla. 1977); Kidwell v. State, 394 So.2d 526 (Fla. 3rd DCA 1981). The present case, for two related reasons, is an exception. First, the primary focus of

[10] Blake v. Zant, supra, at 779, and Voyles v. Watkins, supra, at 910, indicate that this standard is to be applied with particular care in capital cases. See also State v. Myles, supra, at 30. Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981), rejects the proposition, attributed to Voyles, that a stricter standard of effective assistance applies in capital cases. Appellant in the present case is satisfied with the standard of "counsel reasonably likely to render, and rendering, reasonably effective assistance", but would note that the penalty phase in a capital case is sui generis among sentencing proceedings, and preparation which might be quite reasonable for an ordinary sentencing hearing may be grossly inadequate for a capital trial's penalty phase. See Valle v. State, 394 So.2d 1104, 1008 (Fla. 1981).

the issue presented here concerns deprivation of the opportunity to be represented by reasonably effective counsel, caused by an adverse ruling of the trial court; i.e. the court's refusal to grant a continuance of the penalty phase despite his awareness that counsel was completely unprepared. (And thus not reasonably likely to render effective assistance.) This is essentially a due process issue which can be, and often has been, considered on direct appeal. See Valle v. State, 394 So.2d 1004 (Fla. 1981); Harley v. State, ___ So.2d ___ (Fla. 1st DCA 1981) (Case No. AC-385, opinion filed December 18, 1981) (1982 FLW 1); Meadows v. State, 398 So.2d 694 (Fla. 2nd DCA 1980); Kimbrough v. State, 352 So.2d 925 (Fla. 1st DCA 1977); Grizzell v. State, 189 So.2d 367 (Fla. 1st DCA 1966); Hawkins v. State, 184 So.2d 486 (Fla. 1st DCA 1966); Brooks v. State, 176 So.2d 116 (Fla. 1st DCA 1965).

In the second place, the rule set forth in State v. Barber, supra, is that a claim of ineffective assistance of counsel cannot be raised for the first time on direct appeal, as it is a matter which has not previously been ruled on by the trial court. In the present case, the trial judge considered the defendant's allegations of ineffective assistance of counsel as part of an amended motion for new trial. The court specifically ruled on those allegations in denying the motion, for the express purpose of preserving the issue for appellate review (ST-6-7). Moreover, defense counsel's representation, in moving for a continuance, that he was unprepared for the penalty phase (which amounted to an admission that he was not reasonably likely to render reasonably effective assistance) placed the trial court on notice of that aspect of the ineffective assistance claim. His denial of a continuance, in that context, operated as a ruling on the issue.

As a general principle, the decision to grant or deny a motion for continuance is a discretionary ruling, but where the trial court's refusal to grant a continuance deprives a defendant of his right to be represented by adequately prepared counsel, that discretion has been abused. See Valle v. State, supra; Harley v. State, supra; Meadows v. State, supra; Kimbrough v. State, supra; Grizzell v. State, supra; Hawkins v. State, supra; Brooks v. State, supra. Here, it might be argued that it was not the court's ruling that forced the defendant to proceed with unprepared counsel, but rather it was the attorney's own failure, for which he offered no explanation, to investigate potential sources of mitigating evidence which caused the problem. In other words, it appears to have been his own fault. However, as the trial judge admonished the defendant at an earlier juncture in the trial ". . . in this case Richard Sherman Williams is on trial, not Mack S. Futch" (T-559). Similarly, it is Richard Sherman Williams, and not Mack S. Futch, who faces execution. In Hawkins v. State, supra, at 488, the appellate court soundly rejected the state's contention that, in such circumstances, "the derelictions [of defense counsel] must be visited on the defendants." See also Meadows v. State, supra, at 695 (trial court committed reversible error in denying continuance where, while the court was "understandably exasperated by a feeling that it . . . was being manipulated by a 'ring-wise' defendant," the court was aware on the morning set for trial that no one had prepared a defense for the accused); Kimbrough v. State, supra (trial court abused discretion in denying continuance where the assistant public defender who tried the case had stated that he was completely unprepared for trial, notwithstanding

the fact that a different assistant public defender had previously announced that he was ready for trial). The appellate court in Kimbrough said:

> The record of the trial proceedings reflects a valiant effort by defense counsel to represent his client. He extensively cross-examined the state's prosecution witnesses pertaining to the events involving the false imprisonment and battery charges. Yet he called no witnesses other than the defendant. And the record in our opinion does not refute counsel's allegations that he was unprepared for trial, thus depriving defendant of adequate representation. The error no doubt could have been corrected had the court insisted that the assistant public defender who represented he was prepared for trial go forward with his defense. Nevertheless that attorney did not assist him at trial, and a defendant should not be bound to his prejudice by the expressions of an attorney he is prepared, who then abandons his client and apathetically entrusts him to the care of another attorney who knows nothing of the case. A defendant's judicial fate may not depend upon such capricious circumstances.
>
> Kimbrough v. State, supra, at 928.

The import of these decisions is that the trial court cannot deny a continuance, where he knows or should know that this will leave the defendant's case in the hands of unprepared counsel, simply on the ground that it is counsel's own fault he's unprepared. Sanctions, in this situation, should be imposed against the attorney if appropriate, and not against the defendant. The court might, for example, hesitate to appoint that attorney to handle any more capital trials. But to require a defendant in a capital case to submit the question of his life or death to a jury and judge, with the assistance of an attorney who doesn't have a clue as to what, if any, mitigating evidence might be available, violates elemental principles of due process and fundamental fairness, as well as the right to

effective assistance of counsel.

A number of alternatives were open to the trial court to protect the defendant's right to effective counsel in the penalty phase. Fla. Stat. §921.141(1) provides that the penalty proceeding in a capital case shall be conducted "as soon as practicable" after conviction or adjudication of guilt. While it may be "practicable" to conduct the penalty phase with an unprepared defense lawyer, it is not constitutional. However, if inquiry had revealed that defense counsel needed, say, a week or ten days to become prepared, the penalty phase could have been conducted then,before the same jury. See Downs v. State, 386 So.2d 788, 794 (Fla. 1980) (four day gap between guilt and penalty phases). If properly instructed to avoid outside influences, the jury would not need to be sequestered. Downs v. State, supra. Another possibility would have been to impanel a special jury to determine the issue of penalty, pursuant to Fla. Stat. §921.141(1). See Messer v. State, 330 So.2d 137, 142 (Fla. 1976). The prosecutor urged the court to proceed with the penalty phase as scheduled, because he was prepared and had his witnesses ready. As it turned out, he had only one witness - a local witness - who was the inmate records supervisor at the prison, and who brought the defendant's commitment papers to court. Obviously, the state's case would not have been prejudiced by a continuance. As for inconvenience to the jurors or the expense of impaneling a special jury, those are considerations which might well warrant sanctions against the unprepared attorney, if he could not justify his conduct. They are not considerations which warrant denial of a continuance, in the face of the attorney's uncontroverted allegation that he is in fact

unprepared. Kimbrough v. State, supra; Meadows v. State, supra; Hawkins v. State, supra.

Blake v. Zant, 513 F.Supp. 772 (S.D. Ga. 1981) involved habeas corpus petitions filed by three Georgia prisoners who had been sentenced to death. Two of them, Blake and Burger, alleged, inter alia, that they had received ineffective representation in the penalty phase of their trials. With respect to Burger's claims, the District Court emphasized that the attorney made a strategic decision, after some background investigation, not to present any character evidence, in order to retain closing argument, and in order to avoid revealing to the jury Burger's prior violent conduct and his generally "sadistic" attitude. The District Court concluded that the attorney made a necessarily difficult tactical choice with at least some awareness of the relevant facts, and then carried out his strategy in a manner which clearly met reasonable professional standards. Blake v. Zant, supra, at 797. With respect to Blake's claims, in contrast, the attorney's failure to present mitigating evidence was not a matter of strategy, but lack of preparation. Blake's attorney Mr. Haupt was an experienced trial lawyer who had defended as many as a hundred capital cases. Mr. Haupt customarily did not prepare to present mitigating factors in the event of a conviction, because he did not expect or plan for his client to be convicted. In Blake's trial, when the jury retired to deliberate, Mr. Haupt could "feel" that a guilty verdict was in the offing, so he asked the trial judge for a continuance to prepare for the penalty phase. The prevailing practice in the county at that time was to proceed directly to the penalty phase, and Mr. Haupt was informed that no continuance would be granted.

Thus, the District Court noted, Mr. Haupt was forced "by his own lack of foresight and trial policies which have since been abandoned" to proceed to the penalty phase with no prior preparation or consideration whatsoever. Blake v. Zant, supra, at 779. "No witnesses had been interviewed and no thought given to how counsel might show the jury 'something good' about Mr. Blake." Blake v. Zant, supra, at 779. There was no reason to conclude that Mr. Haupt did not make a reasonably cogent argument before the jury, but, due to his lack of preparation, he "in no way used or even considered additional evidence which might have been available to support the defendant's cause." Blake v. Zant, supra, at 780. The District Court observed:

> Such a performance hardly comports with the notion that the sentencing phase be in fact a distinct procedure where the jury's attention is focused not just on the circumstances of the crime, but also on "special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime)" Gregg v. Georgia, 428 U.S. 153, 197, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1975) (Stewart, Stevens, Blackmun, Powell, JJ). Counsel's failure to make distinct preparation here is particularly significant in light of the fact that "much of the information that is relevant to the sentencing decision may have no relevance to the question of quilt, or may even be extremely prejudicial to a fair determination of that question." Id., at 190, 96 S.Ct., at 2933.
>
> Blake v. Zant, supra, at 780.

The District Court concluded that Blake was entitled to a new trial on the issue of penalty as a result of the ineffective representation rendered by counsel. See also Voyles v. Watkins, 489 F.Supp. 901, 912 (N.D. Miss. 1980); cf. Martin v. State, 363 So.2d

403 (Fla. 4th DCA 1978).

In the instant case, as in Blake, defense counsel did not forego presentation of mitigating evidence as a matter of strategy or judgment, but because his own lack of preparation left him no alternative. Whether his jury argument was "cogent" is a matter of opinion, but the glaring lack of evidentiary support for the two mitigating circumstances he asked the jury to find is a matter of fact.

One final point needs to be addressed. What of the fact that the defendant declined to testify in his own behalf in the penalty phase, and subsequently stated that he preferred a death sentence to a sentence of life imprisonment? Does this render the court's denial of a continuance, and defense counsel's ensuing inability to present any mitigating evidence, "harmless error"? Appellant submits that it clearly does not. First, a defendant who is so inclined cannot "choose" the death penalty as a matter of right. See Goode v. State, 365 So.2d 381, 384 (Fla. 1978). There is also a strong societal interest in a fair and accurate determination of whether the death penalty is appropriate. See Beck v. Alabama, supra; Gardner v. Florida, supra. The defendant's decision not to testify in the penalty phase does not signify that he did not want to submit any mitigating evidence to the jury. During the guilt phase, for example, the defendant also declined to testify, but he objected strenuously to counsel's (tactical, in that instance) decision not to call other witnesses. By the time the defendant's statements in the PSI and at sentencing were made, to the effect that he preferred the death penalty to life at FSP, the jury's death recommendation had already

been returned. The defendant may simply have felt by then that a death sentence was a foregone conclusion anyway. The defendant's stated reason for asking for the death penalty is also of interest - that "when on death row he has television in his cell, radio, gets out to use the yard, has canteen privileges, and visits once a week" (S.R. Nov. 19, 1981, p.2). In this connection, the PSI also states, under the heading of "Interests and Activities": "Subject related that there is nothing to do in confinement. He relates that he occasionally plays games with himself" (S.R. Nov. 19, 1981, p.5). Thus the defendant's request for the death penalty may say more about the "possible effect" of long-term close confinement than counsel's argument to the jury did. The defendant's need for, and right to, effective counsel in the penalty phase was in no way obviated by his subsequent statements that he preferred the death penalty to a life sentence.

A new trial on the issue of penalty is required.

IV CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court vacate the judgment and sentence of death and remand for a new trial [Issue I]. In the alternative, appellant respectfully requests that this Court vacate the death sentence and remand for a new advisory sentencing proceeding [Issue II].

Respectfully submitted,

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

initial brief, at pages 28-30.

ISSUE II

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT A CONTINUANCE OF THE PENALTY PHASE WHEN DEFENSE COUNSEL REPRESENTED THAT HE WAS UNPREPARED TO PRESENT ANY EVIDENCE OF MITIGATING CIRCUMSTANCES; THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Lacking any substantive basis to defend the trial court's refusal to continue the penalty phase, in the face of defense counsel's uncontroverted representations that he was unprepared to present any evidence of mitigating circumstances, the state relies on hypertechnical, and largely irrelevant, procedural arguments.

The state asserts that this Court cannot consider the issue arising from the trial court's denial of the continuance, because defense counsel did not object after the trial court's ruling (AB-12-13). Defense counsel did inform the trial court that he was "unable and unprepared" to proceed with the penalty phase (T-628), and requested a continuance to permit the defendant "an opportunity to prepare whatever mitigating circumstances might be appropriate to submit to the jury" (T-628) (thus indicating that counsel did not even know what mitigating circumstances there might be). After the prosecutor asked the court to proceed with the penalty phase on the ground that he was prepared, and on the ground that defense counsel knew all along that the state

would be seeking the death penalty, defense counsel repeated that he was unprepared, and again urged that "the only fair thing to do would be to give the defendant an opportunity to assemble whatever mitigating circumstances are available to him for presentation to the jury" (T-629). The trial court said he would take the motion under advisement during the noon recess, but that it would be well for both parties to assume that the penalty phase would proceed as scheduled (T-630). At the beginning of the penalty phase, the court announced his ruling denying a continuance.

Incredibly, the state argues that the trial court was not placed on notice that "error [might] be imminent" (AB-13). The state is of the view that if counsel had said "I object" when the court announced his ruling denying the requested continuance, only then would the court be on notice "of the possibility of error" (AB-13). The state cites the inapplicable case of Lucas v. State, 376 So.2d 1149 (Fla. 1979),in which defense counsel began to point out that the name of a prospective witness had not been disclosed in discovery, the trial court (incorrectly) stated that rebuttal witnesses need not be furnished, and defense counsel, deferring to the court's interpretation of the law, refrained from making the objection he was apparently about to make. In Lucas, no ruling was requested, or made. In the present case, defense counsel requested a continuance of the penalty phase, and stated a clear and compelling reason why a continuance was necessary, i.e. that he was completely unprepared to proceed.

The court ruled on the requested continuance, denying it. Any further objection would clearly have been futile. See Simpson v. State, ___ So.2d ____ (Fla. 1982)(case no. 49,681, opinion filed April 8, 1982) (1982 FLW 169); Thomas v. State, ___ So.2d ___ (Fla. 1982) (case no. 60,477, opinion filed March 25, 1982) (1982 FLW 148); Henry v. Wainwright, 661 F.2d 56, 58 (5th Cir. 1981). Moreover, a formal objection at that point would have added not one iota to the trial court's understanding of the nature of the putative error or his opportunity to cure it. See Castor v. State, 365 So.2d 701, 703 (Fla. 1978); Williams v. State, ___ So.2d ___ (Fla. 1982) (case no. 58,704, opinion filed May 13, 1982). "Magic words" are not necessary to preserve an issue for appellate review. See Williams v. State, supra (slip opinion, p.3).

The state next interposes numerous irrelevant procedural requirements which govern (or used to govern) a motion for continuance on grounds relating to the absence of a known witness or witnesses. Fla. Stat. §916.05 [superseded by Fla.R.Cr.P. 3.190 (g) as of January 1, 1968, and repealed in 1970] stated:

> An application for continuance on the ground that a witness is absent shall state:
>
> (1) The name and residence of the witness and that the witness is absent;
>
> (2) The facts expected to be proved by the witness;
>
> (3) That the testimony of the witness is material and not merely

cumulative, and that the facts to be proven by the witness cannot be proven by any other available witnesses;

(4) Whether the witness is a legal resident of this state;

(5) Facts showing that due diligence has been used to obtain the witness, and that a service of a summons on the witness has been attempted, within a reasonable time before trial, that the witness could not be found;

(6) Facts showing that the applicant expects to be able to procure the attendance of the witness at a specified time;

(7) That the witness is not absent through the procurement, connivance, or consent, either directly or indirectly, of the applicant;

(8) That the applicant believes that the cause cannot be tried with justice to the party without the evidence of such witness;

(9) Facts showing when the witness left the jurisdiction of the court; whether his absence is temporary or permanent, and when he is expected to return;

(10) Facts showing when and how the applicant learned that the witness would testify as alleged in the motion;

(11) If the witness is not expected to return, then the filing of interrogatories to be propounded to such absent witness, and a request that a commission be issued to take the deposition of such witness, if the applicant is the defendant;

(12) That the witness will be present at a designated time, not later than the next term of court, or that his deposition will be obtained (if applicant is defendant).

By their terms, the above statutory requirements applied to motions for continuance where the identity, and the substance of the testimony, of a specific absent witness or witnesses were known. Even assuming arguendo that the case law developed under the statute retains precedential force under Fla.R.Cr.P. 3.190(g) [which, unlike §916.05, does not set forth specific allegations necessary to an application for continuance on the ground that a witness is absent], those requirements are patently inapplicable where the continuance is sought on the ground that counsel is so unprepared that he does not know who the witnesses might be or what they might have to say.

To the extent that the motion for continuance as presented by defense counsel may have failed to comply with procedural requirements of Rule 3.190(a) and (g), those formal deficiencies would not justify denial of the motion under the circumstances of this case. In Shepherd v. State, 108 So.2d 494, 497 (Fla. 1st DCA 1959), the appellate court said:

> It is true that in the case now considered the motion for postponement or continuance did not technically comply with the requirements of our statute with respect to form or verification, which failure constituted the basis of the trial court's denial thereof. It does not follow that such technical deficiencies mandatorily required denial of such a motion if under the circumstances its allowance is necessary to insure a fair trial. When it is shown that in consequence of inadvertence of counsel, or other cause, the rigid enforcement of rules of procedure would defeat the great

> object for which they were established, it is the trial court's duty to so relax them (when it can be done without injustice to any) as to make them subserve their true purpose, which is to promote the fair administration of justice.

In the present case, given defense counsel's utter lack of preparation which was both admitted and uncontroverted, a continuance of the penalty phase was absolutely necessary to permit a fair determination of whether the death penalty should be imposed. The prosecution would not have been prejudiced by a continuance; as noted in appellant's initial brief, the state's only witness in the penalty phase was the records supervisor at Florida State Prison, which is located within the county where the case was tried.

Finally, it should be noted that the trial court can grant a continuance on its own motion, as well as on motion of the defendant or the state. Fla.R.Cr.P. 3.190(g)(2). Under the circumstances of this case, proper exercise of discretion clearly required the court to postpone the penalty phase, whether on motion of the defense or on his own motion, once he became aware that counsel was unprepared and was thus not reasonably likely to render constitutionally adequate representation.

The state appears to concede that the defendant did not receive effective assistance of counsel in the penalty

phase (AB-19),[4] but argues that since it was apparently counsel's own fault that he was unprepared, a continuance need not have been granted. Appellant will rely on the arguments advanced in his initial brief, at pages 39-44, to show that while fault may be relevant to what, if any, sanctions could appropriately have been taken against the attorney, it is completely beside the point in determining whether a continuance is necessary to preserve the defendant's constitutional right to counsel reasonably likely to render effective assistance. One comment in the state's brief requires specific response. The state asserts that none of the cases relied on by appellant "demonstrate that the trial court cannot deny a continuance on the ground that it is counsel's own fault he is unprepared . . ." (AB-21). Among the cases the state seeks to distinguish are Hawkins v. State, 184 So.2d 486 (Fla. 1st DCA 1966); Kimbrough v. State, 352 So.2d 925 (Fla. 1st DCA 1977); and Meadows v. State, supra. In Hawkins v. State, supra, at 488,

[4]The state asserts in its brief that "Gregg [defense counsel in Meadows v. State, 389 So.2d 694 (Fla. 2nd DCA 1980)] was ineffective due to the action of the court, not due to his own inaction or lack of diligence over an extended period of time as in the case at bar" (AB-19). In point of fact, the appellate court in Meadows attributed the fault neither to Gregg nor the trial court, but rather to the defendant's former attorney from Chicago, and possibly to the defendant himself. Nevertheless, the appellate court emphasized that the trial court knew that Gregg had previously withdrawn from the case because the Chicago lawyer had prevented him from assisting in preparing a defense, and that the Chicago lawyer had now been fired for failing to prepare a defense. "Thus, on the morning set for trial the court knew that no one had prepared a defense for the accused"; under these circumstances the denial of a continuance was an abuse of discretion. Meadows v. State, supra, at 695.

the appellate court said:

> The trial judge was squarely confronted with the representation by the attorney he had appointed to represent these defendants that he, the attorney, was not prepared to go to trial. The State did not did not controvert the Public Defender's representation that he was not adequately prepared to defend the defendants. The State's position is that the derelictions, if any, on the part of the Public Defender in this uncontroverted part of the record must be visited upon the defendants. Such position cannot be sustained. It is elemental that an indigent's right to counsel necessarily incorporates the right to effective assistance of counsel and that anything less renders the ensuing trial a farcical and mockery proceeding.

In Kimbrough v. State, supra, and Meadows v. State, supra, the blame for the trial attorney's lack of preparation was placed primarily on the attorney who had previously handled the case. In Kimbrough, both attorneys were assistant public defenders working out of the same office. In Meadows, the court surmised that some of the difficulties might be attributable to gamesmanship on the part of the defendant. In each of these cases, however, it was the fact of the attorney's lack of preparation, and not its cause, which controlled the result.

In a recent decision arising from a Florida case, the Fifth Circuit Court of Appeals discussed the issue of constitutionally adequate preparation for the penalty phase of a capital trial. In Washington v. Strickland, ___ F.2d __ (5th Cir. 1982) (case no. 81-5379, opinion filed April 23, 1982), the appellate court said:

> The district court, reasoning by analogy to the duty to investigate which we have recognized as an essential dimension of effective representation before and during the guilt phase of a criminal prosecution, held that counsel representing a convicted client at a sentencing proceeding has a similar duty 'to make an independent search for witnesses with knowledge of the defendant's character, disposition to commit crimes [and] extenuating circumstances' in order to develop evidence which might mitigate punishment. We agree. 'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and to a degree of guilt or penalty.' Davis v. Alabama, supra, at 1217 . . . (Emphasis added.)
>
> Counsel's duty to conduct an independent investigation and develop information about his client's case extends 'as fully to the dispositional phase of the proceedings as to pretrial preparation and courtroom advocacy.' United States v. Pinkney, 551 F.2d 1241, 1246 (D.C. Cir. 1976).
>
> In capital cases, counsel's preparation for the sentencing as well as the guilt phase of the prosecution is especially important because of the nature and purpose of the distinctive sentencing procedure used in capital cases.
>
> (Slip opinion, at 15028-29)

The Court in Washington v. Strickland, supra, stressed the fact that the U.S. Supreme Court cases which have upheld the constitutionality of death penalty statutes have done so largely on the basis of the "opportunity afforded the defendant to

introduce character evidence and other types of evidence of personal circumstances which might influence the sentencer to be merciful" (Slip opinion at 15029). See Proffitt v. Florida, 428 U.S. 242, 251 (1976); Gregg v. Georgia, 428 U.S. 153, 189-90, 206 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976). Contrast Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 867, 71 L.Ed.2d ___ (1982).

> In the context of a capital sentencing proceeding, in which the integrity and validity of the decision-making process are dependent on the decision-maker's access to a wide variety of information concerning the defendant, we agree with the district court that 'it is reasonable to require counsel to make independent investigation of the mitigating circumstances for sentencing and not to rely merely on the cross-examination of witnesses at a sentencing hearing and espousement of defendant's unsupported view of the events.' Lockett indicates that this obligation extends not only to evidence tending to establish statutory mitigating circumstances but also to evidence of nonstatutory mitigating circumstances.
>
> Washington v. Strickland, supra (slip opinion, at 15030).

The Washington Court observed that the duty to investigate is not limitless, and that counsel is not required to "pursue every path until it bears fruit in the form of a morsel of evidence in mitigation or until all conceivable hope withers." Nor is counsel precluded from making an informed tactical decision not to use certain mitigating evidence.

> Counsel's investigation need only be reasonable under the circumstances, and in evaluating the reasonableness of counsel's efforts, we look at the quality of his overall inquiry into the availability of evidence in mitigation. The purpose of the inquiry is to enable counsel to discover the kind of evidence in mitigation available and to make an informed and reasonable evaluation with his client of the advisability of using such evidence. If counsel's overall inquiry is sufficient for that purpose, then, insofar as the adequacy of his inquiry or investigation is concerned, he has been effective.
>
> Washington v. Strickland, supra, (slip opinion, at 15030)

In the present case, the defense counsel made no inquiry into the availability of mitigating evidence. To his credit, he forthrightly informed the trial court that he was unprepared. Despite being on notice that counsel was not reasonably likely to render reasonably effective assistance in such a (literally) life - or - death matter, the court refused to continue the penalty phase. This ruling was a palpable abuse of discretion, which seriously jeopardized the defendant's right to a reasoned determination of whether the death penalty should be imposed. Cf. Durcan v. State, 350 So.2d 525, 526 (Fla. 3rd DCA 1977); Cooper v. State, 336 So.2d 1133 (Fla. 1976) (cited in the state's brief, at p. 14, 16). A new trial on the issue of penalty is constitutionally required.

ORIGINAL

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD SHERMAN WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

83-6048

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

RICHARD SHERMAN WILLIAMS, petitioner in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by petitioner is attached hereto, wherein petitioner sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Petitioner was adjudged insolvent for the purpose of appeal in the Florida Supreme Court and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that petitioner be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD SHERMAN WILLIAMS,

Petitioner, 83-6048

vs.

STATE OF FLORIDA,

Respondent.

I, RICHARD SHERMAN WILLIAMS, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. I believe that I am entitled to the redress I seek in said cause.

Richard S. Williams
RICHARD SHERMAN WILLIAMS

STATE OF FLORIDA,
COUNTY OF Bradford

The foregoing affidavit of RICHARD SHERMAN WILLIAMS was subscribed and sworn to before me this 6 day of Dec, 1983.

J. W. Warren
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ORIGINAL

83-6048

RICHARD SHERMAN WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, RICHARD SHERMAN WILLIAMS, being first duly sworn, depose and say that I am the Richard Sherman Williams, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are as stated in the Petition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

NONE

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned. $.50

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Richard S. Williams
RICHARD SHERMAN WILLIAMS

STATE OF FLORIDA
COUNTY OF Bradford

The foregoing affidavit of Richard Sherman Williams was subscribed and sworn to before me on this 10 day of Jan, 1984.

J W Warren
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986